87-1440

No. .....

In The

Supreme Court of the United States

October Term, 1987

—o—

SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND,

Petitioner,

v.

CUYAMACA MEATS, INC.; C & M MEAT PACKING CORP.; AND NATIONAL MEAT PACKERS, INC.,

Respondents.

—o—

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

—o—

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February 1988

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QUESTIONS PRESENTED

1. Can an employer whose obligation to contribute to a multi-employer employee pension plan ceases upon impasse in bargaining with the employees collective bargaining representative force the third party beneficiary pension plan to accept contributions based on a "last and final" offer, where that offer deviates from the terms of the expired collective bargaining agreement, and there is no new agreement between the employer and the union?

2. Where the contributing employer unilaterally continues making contributions to a pension trust for a limited period, the sole objective of which is to effect withdrawal in a subsequent plan year thereby decreasing withdrawal liability, does such conduct constitute an evasion of withdrawal liability under § 1392(c) of ERISA?

LIST OF PARTIES

The parties to the proceedings below and before this Court are:

1. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, an unincorporated association;
2. Cuyamaca Meats, Inc.;
3. C & M Meat Packing Corp., and
4. National Meat Packers, Inc.

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MISCELLANEOUS

No. .....

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund, an unincorporated association (hereinafter referred to as "Pension Trust") respectfully prays that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit entered in this proceeding on September 3, 1987.

OPINIONS BELOW

The Opinion of the United States Court of Appeals for the Ninth Circuit (Appendix A, *infra*) is reported at 827 F.2d 491. That Court's order denying Petitioner's petition for rehearing and rejecting Petitioner's suggestion for rehearing *en banc* (Appendix C, *infra*) was filed on December 1, 1987. The order of the United States District Court for the Southern District of California (Appendix B, *infra*) was filed on June 26, 1987, and entered on June 26, 1987, and is not reported.

JURISDICTION

The judgment and opinion of the United States Court of Appeals for the Ninth Circuit was entered on September 3, 1987. A timely petition for rehearing and suggestion for rehearing *en banc* was filed on September 17, 1987. On December 1, 1987, the petition for rehearing was denied, and the suggestion for rehearing *en banc* was rejected. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1). This petition is timely filed with this Court under 28 U.S.C. § 2101(c).

STATUTES INVOLVED

The relevant statutory provisions are:

A. Employee Retirement Income Security Act of 1974, as amended, Sections 3, 402; 29 U.S.C. §§ 1002, 1102.

B. The National Labor Relations Act, Sections 8(a)(5) and 8(d), 29 U.S.C. §§ 158(a)(5) and 158(d).

C. Labor Management Relations Act of 1947, Section 302(c)(5); 29 U.S.C. § 186(c)(5).

D. Multi-Employer Pension Plan Amendments Act of 1980, Sections 515, 4201, 4212; 29 U.S.C. §§ 1145, 1381(a), 1392(a).

STATEMENT OF THE CASE

The Pension Trust is a joint labor-management trust fund created pursuant to Section 302(c)(5) of the Labor Management Relations Act of 1947, as amended (hereinafter "LMRA") 29 U.S.C. § 186(c)(5), and the Employee Retirement Income Security Act of 1974, (hereinafter "ERISA"), 29 U.S.C. §§ 1001-1461, as amended by the Multi-Employer Pension Plan Amendments Act, 29 U.S.C. Public Law No. 96-364, 94 Stat. 1208. The Pension Trust is a multi-employer plan, existing pursuant to a declaration of trust, and organized to receive contributions from employers who are signatory to collective bargaining agreements which provide for such contributions for the purpose of providing retirement benefits to employees of participating employers.

The Employers, Cuyamaca Meats Inc., et al. were each parties to identical collective bargaining agreements with United Food & Commercial Workers, AFL-CIO Local 229A (hereinafter "Local 229"). Each of the collective bargaining agreements, by their terms, expired on March 31, 1983.

Negotiations for new collective bargaining agreements began on March 29, 1983. During negotiations following expirations of the collective bargaining agreements, the Employers continued making contributions to the Pension Trust in accordance with the terms of the expired collective bargaining agreements.

On April 22, 1983, the Employers presented to Local 229 a proposal which the Employers called their "last and final offer." That proposal called for immediate cessation of all Employer contributions to the Pension Trust, and establishment of individual retirement accounts for the employees. On or about May 2, 1983, Local 229 notified the Employers that the April 22 "final offer" had been rejected.

On or about April 29, 1983, the attorney for the Employers was advised that the Pension Trust's assets had increased significantly (mainly due to a temporary surge in stock values of the Pension Trust's investments) since the plan year ended on June 30, 1982. Accordingly, if cessation of the Employers' obligation to contribute did not occur until after the plan year about to end on June 30, 1983, the Employers' aggregate withdrawal liability would be decreased by approximately one million dollars.

Subsequently, on May 5, 1983, the Employers revised their "final offer" of April 22, 1983, and offered, instead of the establishment of IRA's and immediate withdrawal from the Pension Trust, continued contributions to the Pension Trust for approximately 3½ months, so as to carry the withdrawal over the end of the succeeding plan year. Additionally, the proposal to continue these short-lived contributions was to be effective only as to those

employees who had been in service with the employer for twelve continuous months.

No agreement was reached between the parties, and impasse was reached. On or about May 24, 1983, the Employers implemented the economic terms of their April 22 "final offer" as amended on May 5, 1983, including a reduction of wages and a tender of pension contributions for those employees who had in excess of twelve months continuous service.

The Pension Trust declined to accept the tendered contributions on the grounds that, after impasse in negotiations, there was no effective written collective bargaining agreement, as required by § 302(c)(5) of the LMRA.

On September 30, 1983, the Pension Trust sent a letter to each of the three Employers, stating that the Pension Trust had determined that each of the Employers had ceased to have an obligation to contribute to the Pension Trust as of May 23, 1983, the date of bargaining impasse. Accordingly, the Pension Trust advised each of the Employers that they were indebted to the Pension Trust for withdrawal liability, in accordance with the provisions of the MPPAA.

The Employers brought an action for declaratory relief in the United States District Court for the Southern District of California. The Pension Trust counterclaimed for declaratory relief. Each of the parties sought from the District Court a determination as to the date on which the Employers ceased to have an "obligation to contribute" within the meaning of § 4212 of the MPPAA. 29 U.S.C. § 1392(a).

Upon cross motions for summary judgment, the District Court granted the Employers' motion, and denied the motion of the Pension Trust.

On appeal a panel of the Ninth Circuit affirmed, holding: *inter alia,* that the Employers were obligated to continue making contributions to the Trust Fund after reaching impasse in collective bargaining negotiations.

REASONS FOR GRANTING THE WRIT

I. The Employers' Obligation To Contribute Ceased At Impasse

The MPPAA provides that an employer becomes liable to compensate the Pension Trust for its share of the Trust's unfunded liability ("withdrawal liability") upon complete or partial withdrawal from a multi-employer plan. 29 U.S.C. § 1381(a).

A "complete withdrawal" occurs when an employer either "(1) permanently ceases to have *an obligation* to contribute under the plan or (2) permanently ceases all covered operations under the plan." 29 U.S.C. § 1383(a) (Emphasis added).

An "obligation to contribute" is defined in the statute as "an obligation to contribute arising (1) under one or more collective bargaining (or related) agreements or (2) as a result of a duty under applicable labor-management relations law . . ." 29 U.S.C. § 1392(a). (Emphasis added).

In this case the Employers were obligated to make contributions to the Pension Trust during the term of the

collective bargaining agreement, and thereafter until impasse in collective bargaining negotiations. Since there is no obligation to contribute thereafter under applicable labor management relations law, the obligation to contribute ceased on the date of impasse.

It is well settled under federal labor law that Section 8(a)(5) of the National Labor Relations Act, 29 U.S.C. § 158(a)(5), mandates that an employer must maintain the status quo as to wages and working conditions, following the expiration of the collective bargaining agreement, until impasse. Unilateral changes during negotiations as to conditions of employment which are mandatory subjects of bargaining under Section 8(d) of the NLRA constitute unfair labor practices. *NLRB v. Katz,* 369 U.S. 736, 82 S.Ct. 1107 (1949). Payment of fringe benefit contributions has long been held a mandatory subject of bargaining under Section 8(d) of the NLRA, 29 U.S.C. § 158(d). Cessation of fringe benefit contributions prior to impasse thus violates Section 8(a)(5). *Clear Pine Mouldings,* 238 NLRB 69 (1978) *enf'd sub nom Clear Pine Mouldings, Inc. v. NLRB,* 632 F.2d 721 (9th Cir. 1980) *cert. denied* 451 U.S. 984 (1981).

It is also well settled labor law that, subsequent to impasse, an employer may institute those changes proposed at the bargaining table immediately prior to impasse.[1]

The Ninth Circuit's holding in this case, however, stands for the proposition that that which is allowable after

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[1]Compare the case where, subsequent to impasse, the employer institutes unilateral changes not previously proposed at the bargaining table. *Atlas Tack Corp.,* 226 NLRB 222 (1976) *enf'd* 559 F.2d 1201 (1st Cir. 1977).

impasse under federal labor law equates to a binding obligation on both parties. There is no authority for this proposition, and, for the reasons stated below, the panel's holding is contrary to sound public policy with regard to the efficient regulation of pension plans under ERISA, as well as being contrary to congressional goals seeking the promotion of harmonious labor relations. The ruling is also contrary to the holdings of other panels within the Ninth Circuit in *Woodward Sand Co. v. Western Conference of Teamsters Trust Fund*, 789 F.2d 691 (9th Cir. 1986) and *Peerless Roofing Co. Ltd. v. NLRB*, 641 F.2d 734 (9th Cir. 1981), both of which expressly held that the employer's obligation to contribute continues after expiration of the collective bargaining agreement *until* impasse.

The question of the employer's obligations after impasse has been the subject of recent arbitrations over the date of withdrawal. The logic is inescapable:

> "Having reach an impasse [the employer] was now free to make contributions to another plan which it might adopt, or to take the action it did, which was to make no contributions of any sort to any plan. *Under no circumstances was [the Employer] obligated to make contributions to the plan in this case, unless it should voluntarily enter into an agreement to do so* . . . " (Emphasis added)

Garland Coal Company and UMW 1950 and 1974 Pension Trusts, 7 EBC 1771 (1986); Accord, *Marvin Hayes Lines, Inc. and Central States Pension Fund*, 8 EBC 1841 (1987).

The action taken by the respondents in this case to continue making contributions without an obligation or an agreement to do so, is not countenanced or contemplated under the opinions of the arbitrators. Moreover, payments without written agreement are specifically prohibited by

Section 302(c)(5)(B) of the Labor Management Relations Act ("LMRA"), 29 U.S.C. 186(c)(5)(B). (See Below).

II. Payments To Union Trust Funds After Impasse Are Prohibited By Statute

When Congress enacted Section 302(c)(5)(B) of the LMRA, one of the pronounced reasons was to prevent collusion and kickbacks to union officials. Accordingly, Section 302(c)(5)(B) prohibits any payments to union officers or agents except where "the basis on which such payments are made is specified in a written *agreement* . . . " (Emphasis added). Virtually every Circuit has held this Section to preclude oral modification of the terms of the agreement. See, e.g., *Abbate v. Browning-Ferris Industries of Elizabeth, New Jersey, Inc.*, 767 F.2d 52 (3rd Cir. 1985); *Maxwell v. Lucky Construction*, 710 F.2d 1395 (9th Cir. 1983). The decision below in this case would not only dispense with the necessity of a written agreement, but with any agreement whatsoever. The Union never agreed to the terms and conditions under which the Employers proposed to make short term contributions on behalf of selected employees, either in writing or orally. The consequence of the Ninth Circuit's decision would allow the employers to dictate the terms upon which the Pension Trust would be required to accept payments. Insofar as the employer would be able to dictate the amount of such payments, substantial underfunding could result. This is precisely the problem ERISA sought to remedy by imposition of withdrawal liability. 29 U.S.C. § 1001(a).

The cases cited by the Circuit Court are those in which the terms of expired collective bargaining agreements were enforced as to fringe benefit contributions due *prior* to impasse. There is no authority for utilizing the expired

agreement as the written basis for contributions *ad infinitum* after impasse. This theory was addressed foursquare by the U.S. District Court for the Eastern District of Michigan in *Steinmetz Electrical Contractors Association v. Local Union No. 58, International Brotherhood of Electrical Workers, AFL-CIO,* 517 F.Supp. 428, 433 (E.D. Mich. 1981), "[I]t is equally reasonable to assert that the expired agreement cannot have effect in perpetuity." Moreover, in the instant case the Employers did not even seek to comply with the terms of the expired collective bargaining agreement. Instead, the Employers sought to implement a unilateral proposal to carve out a subset of employees for whom it will make contributions for an extremely brief period of time, not to benefit the employees (e.g. to secure the necessary period of contributions for vesting rights), but solely to avoid its fair share of compensation for the unfunded liability created by the Employers' intended withdrawal from participation in the Pension Trust. Such conduct is clearly contrary to the very purpose Congress expressed in creating withdrawal liability to ensure the protection of employees' retirement benefits. And despite the fact that the union never agreed to this proposal, the Circuit Court ruled that the employer had an obligation to implement the proposal. With all due respect, that Court's ruling is clearly erroneous. The consequences of letting that decision stand could spell economic disaster for the millions of workers whose retirement depends on the viability of similarly situated Funds.

III. The Employers Were Acting To Evade Liability In Violation Of The MPPAA

Section 4212(c) of MPPAA, 29 U.S.C. § 1392(c) provides:

> "If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction."

Respondent and the Circuit Court conceded that the purpose of their short-term contribution proposal was to minimize withdrawal liability. Without pointing to any authority, the Circuit Court excepts from the mandate of the statute, transactions which are proposed during negotiations.

Not only is such a proposition without authority or support, it flies in the face of the clear language of the statute. Notice that the language prohibits avoidance as well as evasion. Nowhere in the legislative history does there appear any intent expressed by Congress to except from withdrawal liability employers who attempt to continue contributions on terms never agreed to by the employees' bargaining representative.

It is well settled that an employer's proposal to enter into a collective bargaining agreement of extremely short duration (e.g. the remaining few weeks before a union's certification year expires) constitutes bad-faith bargaining and an unfair labor practice. *NLRB v. Henry Heide, Inc.*, 219 F.2d 46 (2nd Cir. 1954) *cert. denied*, 349 U.S. 952 (1955).

Similarly, the proposal of these Employers to continue contributions, not for the life of the collective bar-

gaining agreement, but for the three short months that would push them into the next plan year, was clearly a bad-faith attempt to evade withdrawal liability, and is expressly forbidden by statute. This Honorable Court should not allow such conduct.

———o———

CONCLUSION

For the reasons suggested above, the petition for a Writ of Certiorari should be granted.

Respectfully submitted,

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February 1988

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CUYAMACA MEATS, INC., a California corporation, C & M MEAT PACKING CORP., a California corporation, and NATIONAL MEAT PACKERS, INC., a California corporation, Plaintiff-Appellees.	)	No. 86-6182
	)	D.C. No. 84-1169-B(CM)
v.	)	
	)	OPINION
SAN DIEGO and IMPERIAL COUNTIES BUTCHERS' and FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association, Defendant-Appellant.	)	(Filed Sept. 3, 1987)

OPINION

REED, District Judge:

INTRODUCTION

This is a case brought by employer participants in a pension fund to enforce provisions of the Multiemployer Pension Plan Amendments Act of 1980 ("MPPAA"). All parties seek a declaration of the date on which the employers withdrew from the pension fund. The employers argue that they withdrew on September 1, 1983; the fund argues that the employers withdrew on May 23, 1983.

The district court granted summary judgment to the employers. The pension fund appeals.

The issues in this case involve construction of 29 U.S.C. §§ 1382, 1383, and 1392, provisions of the MPPAA. The United States District Court for the Southern District of California assumed jurisdiction over this case pursuant to 28 U.S.C. § 1331 and 29 U.S.C. § 1451. This Court has jurisdiction over the appeal under 28 U.S.C. § 1291.

FACTS

The facts relevant to this appeal are not in dispute. Neither side takes issue with the district court's findings.

The appellant, San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund ("Pension Fund"), is a jointly trusteed labor-management trust fund created pursuant to the Labor-Management Relations Act of 1947 ("LMRA"). The Pension Fund exists pursuant to a declaration of trust and was organized to receive contributions and make payments for the purpose of providing retirement benefits to employees of participating employers. Appellant is a multiemployer employee benefit plan. *See* 29 U.S.C. §§ 1002(37)(A) and 1301(a)(3).

Cuyamaca Meats, Inc., C & M Meat Packing Corp., and National Meat Packers, Inc., (hereafter collectively referred to as "Employers") were parties to identical collective bargaining agreements entered into in 1979 ("1979 CBAs") with United Food and Commercial Workers, AFL-CIO, Local 229A ("Local 229A"). The 1979 CBAs expired, by their terms, on March 31, 1983. In the 1979 CBAs, each of the Employers agreed to accept the terms of and become a party to the trust agreement, which established the Pension Fund. Each Employer further

agreed to contribute on a monthly basis to the Pension Fund specified sums based on hours worked by employees represented by Local 229A.

Negotiations between the Employers and Local 229A regarding new collective bargaining agreements commenced on March 28, 1983, just prior to the March 31, 1983, expiration of the 1979 CBAs. While negotiations continued, and following the expiration of the 1979 CBAs, the Employers continued to make contributions to the Pension Fund in accordance with the terms of the expired agreements.

On April 22, 1983, each of the Employers presented a written offer to Local 229A, termed a "final offer". With respect to pensions, the offer proposed that the Employers would establish and contribute to individual retirement accounts on behalf of the employees. Implicit in the proposal was that the Employers would cease to contribute to the Pension Fund.

On May 2, 1983, Local 229A notified the Employers by telegram that the April 22 offer had been rejected by the union membership. The union requested additional negotiations.

Meanwhile, on April 29, 1983, the Pension Fund's attorney wrote a letter to the Employers' attorney in response to the latter's request. The letter said that the market value of the Pension Fund's assets had increased significantly since the end of the last plan year, June 30, 1982. The level of assets of the Pension Fund was a key factor in determining the withdrawal liability that the Employers would incur upon separating from the Pension

Fund, and the withdrawal liability would be calculated based upon the status of the Pension Fund as of the end of the last plan year. The letter to the Employers' attorney stated that the increase in value of the assets of the Pension Fund was such that, if the last plan year had ended on March 31, 1983, instead of June 30, 1982, the Employers' withdrawal liability would be reduced by almost one million dollars.

The next negotiating session was held May 5, 1983. At that meeting, the Employers revised their offer of April 22, 1983, with respect to retirement only, as follows:

> Amend Section XVIII, *Retirement*, to provide:
>
> 1. The Company shall continue its present pension plan through August 31, 1983, which shall be subject to an eligibility requirement of twelve (12) months' continuous service.
>
> 2. The plan set forth in Section XVIII of the Companies' April 22, 1983, proposal shall become effective September 1, 1983.

The parties could not reach agreement. On May 23, 1983, the Employers notified the union that an impasse existed.

On May 24, 1983, the Employers implemented the terms of their April 22 offer as modified on May 5, 1983. With respect to pensions, the proposal implemented by the Employers was that they would contribute to the Pension Fund through August 31, 1983. The Employers did tender such contributions through August 31, 1983; the Pension Fund, however, refused to accept them beginning on May 23, 1983.

On June 8, 1983, Local 229A commenced a strike and picketing against the Employers. On June 28, 1983, Local 229A filed an unfair labor practices charge against the Employers with the National Labor Relations Board ("NLRB"). The union contended that no bona fide impasse existed on May 24, 1983, and that, therefore, the Employers were not privileged to implement their last offer. On August 11, 1983, the NLRB Regional Director dismissed the charges, and on October 31, 1983, the NLRB Office of Appeals upheld the dismissals, stating that a genuine impasse had occurred by May 24, 1983.

On September 30, 1983, the Pension Fund sent a letter to each of the Employers, stating that the Pension Fund had determined that the Employers had ceased to have an obligation to contribute to the Pension Fund as of May 23, 1983, because of impasse. The Pension Fund claimed that the Employers were indebted to it for the following withdrawal liability, calculated assuming a May 23, 1983, withdrawal date:

Cuyamaca Meats, Inc.	$279,750.08
C & M Meat Packing Corp.	428,329.46
National Meat Packers, Inc.	146,127.28

The Pension Fund has not attempted to collect the withdrawal assessments during the pendency of this litigation.

In February, 1984, the Employers learned what their withdrawal liability would be if calculated assuming a withdrawal date of September 1, 1983, the date on which the Employers actually stopped tendering contributions to the Pension Fund:

Cuyamaca Meats, Inc.	$ 38,213.76
C & M Meat Packing Corp.	48,226.50
National Meat Packers, Inc.	14,881.32

The appellees filed the complaint initiating the case at bar in the United States District Court for the Southern District of California on May 1, 1984. The appellant Pension Fund counter-claimed on May 22, 1984. On August 29, 1984, the appellees filed an amended complaint. Both sides seek a declaration of the date on which the Employers withdrew from the Pension Fund.

On cross-motions for summary judgment, the district court granted summary judgment in favor of the Employers, declaring that "the plaintiffs withdrew from the defendant Trust Fund on September 1, 1983." *Cuyamaca Meats, Inc. v. San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund*, 638 F. Supp. 885, 891 (S.D.Cal. 1986).

STANDARD OF REVIEW

A district court's grant of summary judgment is reviewed *de novo*. *Lojek v. Thomas*, 716 F.2d 675, 677 (9th Cir. 1983). In this case, the parties agree that there are no genuine issues of fact. Therefore, this Court need only decide whether the substantive law was properly applied. *See United Food & Commercial Workers & Employers Arizona Health & Welfare Trust v. Pacyga*, 801 F.2d 1157, 1159 (9th Cir. 1986).

DISCUSSION: THE EMPLOYERS' WITHDRAWAL FROM THE PENSION FUND

The MPPAA provides that when an employer withdraws from a multiemployer pension plan, the employer becomes liable for its proportionate share of the plan's unfunded vested liability. The purpose of this provision of the MPPAA is to ensure that multiemployer plans are not

rendered insolvent by withdrawing employers. *Board of Trustees v. Thompson Bldg. Materials, Inc.*, 749 F.2d 1396, 1401-1402 (9th Cir. 1984), *cert. denied*, 471 U.S. 1054 (1985).

29 U.S.C. § 1381(a) states:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

This case involves a complete withdrawal. 29 U.S.C. § 1383(a) sets out the factors which indicate a complete withdrawal:

> For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation to contribute under the plan, or
>
> (2) permanently ceases all covered operations under the plan.

29 U.S.C. § 1392(a) contains the definition of "obligation to contribute":

> For purposes of this part, the term "obligation to contribute" means an obligation to contribute arising—
>
> (1) under one or more collective bargaining (or related) agreements, or
>
> (2) as a result of a duty under applicable labor-management relations law, but does not include an obligation to pay withdrawal liability under this section or to pay delinquent contributions.

The Employers had an obligation to contribute to the Pension Fund after impasse was reached in their negotiations with Local 229A. The obligation was one resulting from a duty under applicable labor-management relations law. Specifically, the obligation to contribute resulted from duties imposed upon the Employers by Section 8(a)(5) of the National Labor Relations Act ("NLRA"), 29 U.S.C. § 158(a)(5). That statute provides in relevant part:

> It shall be an unfair labor practice for an employer—to refuse to bargain collectively with the representatives of his employees, subject to the provisions of section 159(a) of this title.

Under 29 U.S.C. § 158(a)(5), an employer must maintain the conditions of employment set forth in an expired collective bargaining agreement until a new agreement is reached or until good faith negotiations result in a bona fide impasse. *American Distrib. Co. v. NLRB*, 715 F.2d 446, 449 (9th Cir. 1983), *cert. denied*, 466 U.S. 958 (1984); *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625, 627 (9th Cir. 1981); *Peerless Roofing Co. v. NLRB*, 641 F.2d 734, 736 (9th Cir. 1981).

When the negotiations reach impasse, the employer may unilaterally impose changes in the terms of employment if the changes were reasonably comprehended in the terms of its contract offers to the union. *NLRB v. Crompton-Highland Mills, Inc.*, 337 U.S. 217, 223-225 (1949); *Peerless Roofing*, 641 F.2d at 735; *Clear Pine Mouldings, Inc. v. NLRB*, 632 F.2d 721, 729-30 (9th Cir. 1980), *cert. denied*, 451 U.S. 984 (1981); *NLRB v. Andrew Jergens Co.*, 175 F.2d 130, 136 (9th Cir. 1949), *cert. denied*, 338 U.S. 827

(1949). The crucial point of these authorities is that after impasse is reached an employer may unilaterally implement new terms of employment only if reasonably comprehended in a pre-impasse offer. The implementation of terms not reasonably comprehended in a pre-impasse offer is an indication that the employer failed to bargain collectively with the employees' representatives as required by 29 U.S.C. § 158(a)(5).

Thus, after impasse, the employer's options are governed by duties imposed by labor-management relations law.

Applying these principles to the case at hand, it is clear that there was no cessation of the Employers' obligation to contribute to the Pension Fund as a result of the impasse that occurred in the negotiations. After expiration of the 1979 CBAs, the Employers had a legal duty, under 29 U.S.C. § 158(a)(5), to continue to make contributions to the Pension Fund in accordance with the terms of the 1979 CBAs. When impasse occurred on May 23, 1983, the Employers were free to make unilateral changes in the terms of employment so long as such changes were reasonably comprehended by their offers to Local 229A. With respect to pensions, the Employers' last offer contemplated continued contributions to the Pension Fund through August 31, 1983, and the establishment of a new retirement plan thereafter. After impasse the Employers implemented their final offer. They tendered contributions to the Pension Fund until September 1, 1983. The Employers tendered those contributions under an obligation to contribute to the Pension Fund within the meaning of 29 U.S.C. § 1392.

An employer who, after termination of a collective bargaining agreement mandating pension fund contributions and after impasse in negotiations with the employees' union, continues to contribute to a pension fund in accordance with a unilaterally implemented offer made to the union during negotiations does so under an obligation to contribute resulting from a duty under applicable labor-management relations law within the meaning of 29 U.S.C. §§ 1383 and 1392.

This conclusion is particularly compelling in view of 29 U.S.C. § 1398(2):

> Notwithstanding any other provision of this part, an employer shall not be considered to have withdrawn from a plan solely because—
>
> > an employer suspends contributions under the plan during a labor dispute involving its employees.

This provision undermines the Pension Fund's argument that withdrawal of the Employers occurred as a result of the impasse in negotiations. The mere existence of an impasse in negotiations does not lead to withdrawal, even if contributions by the employer to the pension fund cease. *See T.I.M.E.-DC, Inc. v. New York State Teamsters Conference Pension & Retirement Fund*, 580 F. Supp. 621 (N.D.N.Y. 1984) ("Defendant suggests an impasse will trigger withdrawal liability. In fact, the concept of impassee is wholly irrelevant to the issues here. As merely a stage in the labor dispute, there is simply no talismanic significance to the presence of an 'impasse.' " 580 F. Supp. at 629), *aff'd.*, 735 F.2d 60 (2d Cir. 1984); *T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund*, 597 F. Supp. 256, 263 (D.D.C. 1984).

In the case at hand, the labor dispute and the impasse in negotiations did not result in cessation of the Employers' contributions. Following impasse, the Employers continued to tender contributions to the Pension Fund. The impasse cannot be construed as effecting a withdrawal on the part of the Employers.

The appellant argues that Section 302(c)(5)(B) of the LMRA, 29 U.S.C. § 186(c)(5)(B), prohibited it from accepting contributions from the Employers after impasse.

29 U.S.C. § 186, in relevant part, provides:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, advisor, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or to agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce;
>
> * * *
>
> (c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided,* That . . . (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer . . . .

This section of the LMRA was intended by Congress to regulate payments by employers to employee representatives. It "was aimed at forestalling practices Congress considered injurious to the collective bargaining pro-

cess such as bribery of employee representatives by employers, extortion by employee representatives, and the potential abuse of power by union officials armed with sole control of welfare funds." *NLRB v. United Brotherhood of Carpenters and Joiners of America, Local 1913,* 531 F.2d 424, 427 (9th Cir. 1976), *citing, Arroyo v. United States,* 359 U.S. 419 (1959).

29 U.S.C. § 186(c)(5) is an exception to an overall prohibition on payments by employers to employee representatives. The exception applies to sums paid to a trust fund established for the benefit of employees and their families, provided that the detailed written basis upon which such payments are to be made is specified in a written agreement. In this case, under well established authority in this circuit, the expired 1979 CBAs satisfied the written agreement requirement for the contributions tendered to the Pension Fund by the Employers after impasse in negotiations.

In *NLRB v. Carilli,* 648 F.2d 1206 (9th Cir. 1981), an employer cited § 186(c)(5)(B) in attacking the NLRB's finding that it violated Section 8(a)(5) of the NLRA by discontinuing payments to a trust fund. The court rejected the argument, holding that an expired collective bargaining agreement satisfied the § 186(c)(5)(B) requirement of a written agreement. As to the effect of impasse, the court stated:

> By finding that the expired collective bargaining agreement and the trust agreements here are sufficient to permit continued payments to the trust funds, we do not, as Antonino's contends, hinge criminal liability under Section 302(c)(5) [29 U.S.C. § 186(c)(5)] upon the difficult determination of whether impasse has

> been reached. The collective bargaining and trust agreements here are sufficient to satisfy the requirements of Section 302(c)(5) and to permit continued payments to the trust funds, whether or not the parties have bargained to impasse.

Carilli, 648 F.2d at 1214.

In *Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund*, 654 F.2d 625 (9th Cir. 1981), an employer who had continued to make contributions to a pension fund after expiration of a collective bargaining agreement and after impasse in negotiations sought a refund of the contributions made after impasse. The employer argued that 29 U.S.C. § 186(c)(5)(B) prohibited the pension fund from retaining the employer's contributions after impasse in the absence of a new written agreement. The court held that § 186(c)(5)(B) did not prohibit the employer's contributions after impasse because "the payments were made in conformity with the terms of an expired written agreement during the course of collective bargaining negotiations." *Id.* at 627. The court went on to say "[i]t is lawful for an employer to continue the payments under these circumstances." *Id.*

The authority in this circuit is clear: impasse in negotiations between employers and union does not prevent expired collective bargaining agreements from serving as the written agreements legitimizing subsequent pension fund contributions.

The appellant further argues that the expired collective bargaining agreements in this case cannot function as the written basis for post-impasse pension fund contributions because of the fact that those contributions were ten-

dered under a pension plan with a new proviso, an eligibility requirement of twelve months' continuous service. In fact, the new eligibility requirement did not affect the payments tendered after impasse. All contributions actually tendered to the Pension Fund by the Employers after impasse were tendered under the terms under which contributions had been made prior to expiration of the collective bargaining agreements. The new proviso only served to further circumscribe the employees on whose behalf contributions would be made. Remembering that the purpose of 29 U.S.C. § 186(c)(5) is to prevent payments by employers to employee representatives which undermine the collective bargaining process, it is plain that the eligibility requirement added to the pension program by the Employers after impasse should not be deemed to have terminated the effect of the expired collective bargaining agreements as written agreements satisfying § 186(c)(5).

All contributions by the Employers to the Pension Fund after impasse were tendered on the basis of specific written agreements.

The appellant also argues that, under 29 U.S.C. § 1392(c), it was required to disregard the Employers' final offer, providing for the Employers' participation in the Pension Fund until September 1, 1983. 29 U.S.C. § 1392(c) states:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

The Employers concede that a purpose of their final offer of May 5, 1983, was to minimize their withdrawal

liability. Even assuming that this aim was a principal purpose of the Employers' last offer to the union, the legislative history suggests that the Employers' May 5, 1983, offer was not a transaction covered by 29 U.S.C. § 1392(c).

The following was stated concerning 29 U.S.C. § 1392(c) during House debates:

> [T]he bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a method of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability.
>
> Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer—or for that matter any employer contributing to a plan—will not be able to evade withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980) (statement of Rep. Frank Thompson).

The Employers' May 5, 1983, offer to Local 229A had economic substance. Every indication is that it was a bona fide, arm's-length offer made during negotiations concerning new collective bargaining agreements. The May 5 offer was not deceptive in any way, and it in no way frustrated the purposes of the MPPAA. It is true that the purpose, and an effect, of the May 5 offer was to delay the calcula-

tion of withdrawal liability until after June 30, 1983, and to thereby minimize such liability. Such an effect, however, was not an evasion or avoidance of withdrawal liability within the meaning of 29 U.S.C. § 1392(c).

The Employers' reaction to the MPPAA, their delay in withdrawing from the Pension Fund, did not undermine the goals of the MPPAA. If an employer hesitates to withdraw from a multiemployer pension fund which has high unfunded benefit liability, the pension fund escapes the dangers sought to be abated by the withdrawal liability provisions. The Employers' May 5, 1983, offer to Local 229A, and the Employers' resulting delay in withdrawal from the Pension Fund was a candid reaction to the changing financial status of the Pension Fund and to the provisions of the MPPAA. The May 5, 1983, offer posed no threat to the financial stability of the Pension Fund.

Employer proposals made during negotiations toward a collective bargaining agreement, and motivated, at least in part, by a desire to minimize withdrawal liability, are not transactions entered into in order to evade or avoid withdrawal liability within the meaning of 29 U.S.C. § 1392(c).

In conclusion, this Court holds that the district court was correct in determining that the Employers withdrew from the Pension Fund on September 1, 1983, when they stopped tendering contributions to that fund, and not on May 23, 1983, when they reached impasse in their negotiations with Local 229A. This conclusion does not conflict with 29 U.S.C. § 186 or § 1392(c).

DISCUSSION: APPELLEES' ATTORNEY'S FEES ON APPEAL

The appellees argue that they are entitled to their attorney's fees on appeal.

Section 4301(e) of the MPPAA, 29 U.S.C. § 1451(e), provides for the discretionary award of attorney's fees to prevailing parties in cases initiated to enforce the provisions of the MPPAA. 29 U.S.C. § 1451(e):

> In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

Section 1451(e) allows the recovery of attorney's fees and costs on appeal. *See Shelter Framing Corp. v. Pension Benefit Guar. Corp.*, 705 F.2d 1502, 1515 (9th Cir. 1983), *rev'd on other grounds sub nom, Pension Benefit Guar. Corp. v. R.A. Gray & Co.*, 467 U.S. 717 (1984).

The case of *West v. Greyhound Corp.*, 813 F.2d 951 (9th Cir. 1987) is helpful as to the factors relevant to the granting of attorney's fees in this case. The appellee in *West* sought attorney's fees under 29 U.S.C. § 1132(g), the attorney's fee statute of the Employee Retirement Income Security Act of 1974 ("ERISA"). The courts have applied principles developed under the ERISA statute in cases under the MPPAA statute. *See Shelter Framing*, 705 F.2d at 1515; *T.I.M.E.-DC, Inc. v. I.A.M. National Pension Fund*, 616 F. Supp. 400, 403 (D.D.C. 1985). In *West v. Greyhound Corp.*, 813 F.2d at 956, the court said:

> The factors to be considered in awarding attorney's fees are as follows: (1) the culpability or good faith of the opposing party; (2) the ability of opposing

party to pay the award fees; (3) the degree of deterrence which would result from an award of fees; (4) whether a number of participants under an ERISA plan would benefit from an award of fees; and (5) the relative merits of the parties' positions. *Hummell v. S.E. Rykoff & Co.*, 634 F.2d 446, 453 (9th Cir. 1980). In *Operating Eng'rs Pension Trust v. Gilliam*, 737 F.2d 1501, 1506 (9th Cir. 1984), we stated that these "factors very frequently suggest that attorney's fees should not be charged against ERISA plaintiffs." We cannot say that the Union Workers have acted in bad faith or that their contentions were completely without merit. Accordingly, we reject ConAgra's request for attorney's fees.

In the case at bar, as well, the key factors are the appellant's good faith or culpability and the relative merits of the parties' positions. It is not clear that the Pension Fund acted in bad faith in this case. It is obvious that it acted to maximize the Employers' withdrawal liability. Such a course is not an indication of culpability, however, to the extent the law supported the Pension Fund's position. In that this case raised novel legal issues, the appellant cannot be expected to have known exactly the strength of the legal positions favoring its interests. Indeed, the Pension Fund's contentions in this case have not been completely without merit. Accordingly, this Court rejects the Employers' request for attorney's fees.

ORDERS

The district court's order granting summary judgment to appellees and denying summary judgment to appellants is AFFIRMED.

Appellees are denied attorney's fees on appeal.

APPENDIX B

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CUYAMACA MEATS, INC., a California corporation; C & M MEAT PACKING CORP., a California corporation; NATIONAL MEAT PACKERS, INC., a California corporation, Plaintiffs, vs. SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association, Defendant.	CASE NO. 84-1169-B (CM) OPINION AND ORDER GRANTING PLAINTIFFS' MOTION FOR SUMMARY JUDGMENT
SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association, Counter-claimant, vs. CUYAMACA MEATS, INC., a California corporation; C & M MEAT PACKING CORP., a California corporation; NATIONAL MEAT PACKERS, INC., a California corporation, Counter-defendants.	

Plaintiffs and counter-defendants, Cuyamaca Meats, Inc., C & M Packing Corp., and National Meat Packers, Inc., ("the Employers"), filed this suit for declaratory judgment on May 1, 1984. Defendant and counter-claimant, San Diego and Imperial Counties Butchers' and Food Employers' Pension Trust Fund ("the Trust Fund"), counter-claimed for declaratory relief on May 22, 1984. Both sides seek a determination of the date the Employers permanently withdrew from the Trust Fund for purposes of ascertaining the amount of the Employers' withdrawal liability under the Multi-employer Pension Plan Amendments Act of 1980 ("the MPPAA").

These cross-motions for summary judgment came on for hearing on April 7, 1986. At the hearing, the Court announced its decision to grant summary judgment for the Employers. The court now enters this Opinion and Order.

I. *BACKGROUND*

A. *Relevant Provisions of the MPPAA.*

Under the MPPAA, an employer becomes liable for withdrawal liability upon a complete or partial withdrawal from a multi-employer plan. 29 U.S.C. § 1381(a). A "complete withdrawal" occurs when an employer either "(1) permanently ceases to have an obligation to contribute under the plan or (2) permanently ceases all covered operations under the plan". *Id.* § 1383(a).[1] An "obligation to contribute" is defined as "an obligation to contribute arising—(1) under one or more collective bargaining (or related) agreements or (2) as a result of a duty under applicable labor-management relations law. . . ." *Id.* § 1392(a).

Pursuant to 29 U.S.C. section 1391, each employer's withdrawal liability is calculated at the end of the pension fund's fiscal year or "plan year" and applies to any withdrawal occurring during the following twelve months. In rough terms, an employer's withdrawal liability is its proportionate share of the subtraction of the market value of the fund's assets from the fund's total benefit liability. During the period relevant to this litigation, the Trust Fund's plan year ended on June 30.

B. *Facts.*

The parties are agreed on the events that gave rise to this lawsuit.

Each of the Employers was party to an identical collective bargaining agreement ("CBA") with Local 229A of the United Food and Commercial Workers Union ("Local 229A") that ran from October 1, 1979, through March 31, 1983. In the CBA, the Employers agreed to accept the terms of and to become a party to the Trust Agreement establishing the Trust Fund, and further agreed to contribute monthly to the Trust Fund specified sums based on hours worked by employees represented by Local 229A.

Negotiations for a new CBA began on March 28, 1983. On March 31, 1983, the CBA negotiated in 1979 expired. The Employers continued to make contributions to the Trust Fund in accordance with the terms of the 1979 CBA. On April 22, 1983, each of the Employers presented an identical comprehensive written offer to Local 229A, termed a "final offer". With respect to pensions, Article XVIII of the final offer proposed establishing and contributing to individual retirement accounts for employees. Implicit in

that proposal was that the Employers would cease contributing to the Trust Fund.

On April 29, 1983, the Trust Fund's attorney wrote a letter to the Employers' attorney, Harry Stang, in response to Stang's request. The letter informed Stang that the market value of the Trust Fund's assets had increased significantly since the end of the last plan year on June 30, 1982. The letter stated that, as a result, if the plan year had ended on March 31, 1983,[2] the total withdrawal liability would have declined by almost one million dollars from the June 30, 1982, figure.

On May 2, 1983, Local 229A notified the employers by telegram that the April 22 "final offer" had been rejected by the union membership. In the telegram, the union also requested additional negotiations, stating "we are not at impasse".

The next negotiating session was held on May 5, 1983. At this meeting, the Employers revised their "final offer" of April 22, 1983, with respect to retirement only, as follows:

> Amend Section XVIII, *Retirement*, to provide:
>
> 1. The Company shall continue its present pension plan through August 31, 1983, which shall be subject to an eligibility requirement of twelve (12) months' continuous service.
>
> 2. The plan set forth in Section XVIII of the Companies' April 22, 1983, proposal shall become effective September 1, 1983.

The parties could not reach agreement. On May 23, 1983, the Employers notified the union that an impasse existed. On May 24, 1983, the Employers implemented the

economic terms of their April 22 final offer as modified on May 5. Accordingly, with respect to pensions, the proposal implemented by the Employers was that they would contribute to the Trust Fund through August 31, 1983. The Employers tendered contributions through August 31, 1983, but the Trust Fund refused to accept them from and after May 23, 1983.

On June 8, Local 229A began a strike and picketing against the Employers. On June 28, Local 229A filed an unfair labor practices charge against the Employers with the National Labor Relations Board ("NLRB"). The union contended that no bona fide impasse existed on May 24, 1983, to privilege the Employers to implement their last offer. On August 11, the NLRB Regional Director dismissed the charges, and on October 31, the NLRB Office of Appeals upheld the dismissals, stating that a genuine impasse had in fact occurred by May 24.

On September 30, 1983, the Trust Fund sent a letter to each of the Employers, stating that the Trust Fund had determined that they had ceased to have an obligation to contribute to the Trust Fund as of May 23, because of an impasse on that date. In those letters, the Trust Fund claimed that the Employers were indebted to the Fund for unfunded vested benefit withdrawal liability in the following amounts:

Cuyamaca Meats	$279,750.08
C & M Meat Packing	428,329.46
National Meat Packing	146,127.28

The Trust Fund has not attempted to collect the withdrawal assessments during the pendency of this litigation.

In February, 1984, the Employers learned precisely what their liability would be if withdrawal occurred on September 1, 1983. An actuarial report showed that the Trust Fund's unfunded liability for the plan year ending June 30, 1983, was only $306,200 compared to $2,541,000 for the plan year ending June 30, 1982. Thus, assuming the Employers withdrew on September 1, 1983 (or any date after June 30, 1983), their respective withdrawal liabilities would be as follows:

Cuyamaca Meats	$ 38,213.76
C & M Meat Packing	48,226.50
National Meat Packing	14,881.32

II. *DISCUSSION*

A. *MPPAA Issues.*

The Employers withdrew from the Trust Fund when they "permanently cease[d] to have an obligation to contribute under the plan". 29 U.S.C. § 1383(a)(1). Section 1392(a) defines "obligation to contribute" as an obligation arising (1) under a collective bargaining or related agreement or (2) "as a result of a duty under applicable labor-management relations law". The 1979 CBA expired on March 31, 1983. After that date, the Employers' obligation to contribute, if any, arose under (1) an agreement related to the CBA or (2) duties imposed by applicable labor relations law. The latter duties include those imposed by the National Labor Relations Act (NLRA). *See I.A.M. National Pension Fund v. Schulze Tool and Die Co.*, 564 F. Supp. 1285, 1295-96 (N.D. Cal. 1983) (hereinafter *Schulze*).

The Trust Fund premises its argument that the Employers withdrew on May 23, 1983, on language from

Schulze to the effect that, once impasse was reached and the employer

> took definite steps to implement its prior position that it would no longer participate in the Plan, then at that point it permanently ceased to have an obligation to contribute to the Plan, and, therefore, withdrew.

Id. at 1296.

Schulze does not support the Trust Fund's position. As *Schulze* explained, section 8(a)(5) of the NLRA, 29 U.S.C. § 158(a)(5), imposes a duty to bargain in good faith on employers and unions. The duty to bargain in good faith requires that, during negotiations, the employer maintain the status quo as to wages and working conditions, even following the expiration date of the agreement. *Peerless Roofing Co., Ltd v. NLRB,* 641 F.2d 734, 736 (9th Cir. 1981). When the employer and the union have bargained to impasse, the employer is then privileged to institute unilateral changes in terms and conditions of employment that were reasonably comprehended by the employer's pre-impasse bargaining proposals. *Id.* at 735.

In *Schulze,* upon impasse, the employer elected to implement his pre-impasse proposal to stop contributing to the pension plan. In the present case, the Employers elected to implement their amended final offer of May 5 to continue contributing to the Trust Fund through August 31, 1983. The quoted language in *Schulze* does not apply here because the Employers chose not to implement their April 22 offer to cease contributing to the Trust Fund, instead choosing to implement their May 5 offer.

The Trust Fund contends that the Employers' obligation to contribute ended on May 23, 1983, because upon impasse, the Employers had the option to stop contributing in accordance with their April 22 offer. The Court disagrees with this reasoning. Once the Employers exercised their privilege to implement their May 5 offer, they assumed an obligation to continue contributing through August 31, because of the effect on third parties of the commitment to contribute to the Trust Fund. The Employers reasonably should have expected their promise to induce justifiable reliance by the employees who were to benefit from it. As a result, if the Employers had not performed their promise, any employees who detrimentally changed their position in reliance on it could be entitled to its enforcement under the doctrine of promissory estoppel. *See* 1 B. Witkin, Summary of California Law §§ 189-90 (8th ed. 1973). Promissory estoppel can be a substitute for consideration. *Id.* Under these circumstances, the Court is of the opinion that the Employers' promise to continue contributing through September 1, 1983, gave rise to an enforceable agreement. This agreement was related to the CBA since, with only a minor modification,[3] it duplicated the CBA's provision with respect to retirement. The Court therefore holds that, by electing to implement their May 5 offer, the Employers incurred an obligation arising under an agreement related to the CBA, for purposes of the application of section 1392(a)(1).

In the alternative, the Court holds that the Employers' election to continue contributing created an obligation arising under duties imposed by the NLRA, pursuant to section 1392(a)(2). The Employers elected to continue

contributing pursuant to their well-established NLRA right, upon impasse, to make unilateral changes that were reasonably comprehended by their pre-impasse proposals. *See, e.g., NLRB v. Katz,* 369 U.S. 736, 745 (1962); *Peerless Roofing, supra; American Federation of Television and Radio Artists v. NLRB,* 395 F.2d 622, 624 (D.C. Cir. 1963). Having pursued that right, the Employers were obligated to contribute through August 31, as explained above, under the doctrine of promissory estoppel.

This reading of section 1392(a) averts a possible conflict between that provision and the rights of employers upon impasse established by NLRA case law. The Court is loathe to interpret section 1392(a) in such a manner as would revoke the Employer's privilege to implement pre-impasse proposals, especially since the NLRA case law was well-settled at the time of the enactment of the MPPAA in 1980. This would be the precise result of adopting the Trust Fund's position. Under the interpretation advanced by the Trust Fund, a pension fund could thwart an employer's election to implement a pre-impasse proposal to continue contributing by refusing to accept contributions after the date of impasse. Obviously, the employer's privilege to implement pre-impasse proposals would be meaningless if not given effect by the Court. The interpretation of section 1392(a) enunciated in this opinion preserves the employer's option under the NLRA to implement pre-impasse proposals and does so in a manner consistent with section 1392(a)'s function of fixing a date for the calculation of withdrawal liability.

The Trust Fund additionally argues that 29 U.S.C. § 1392(c) requires that the Court ignore the May 5 offer. Section 1392(c) provides:

> If a principal purpose of any transaction is to evade or avoid liability under this part, this part shall be applied (and liability shall be determined and collected) without regard to such transaction.

The Employers concede that one of the purposes of the May 5 offer was to minimize the Employers' withdrawal liability by making them liable only for their share of unfunded liability for the plan year ended June 30, 1983. The parties dispute whether this was a "principal purpose" of the proposal.

Even assuming a principal purpose was to reduce withdrawal liability, the legislative history of section 1392(c), sparse as it appears to be, indicates that this proposal was not a transaction that Congress intended the provision to cover. Representative Frank Thompson stated during House debates:

> . . . the bill provides that transactions undertaken to evade or avoid withdrawal liability may not be used as a mehtod of escaping withdrawal liability that would otherwise be imposed. It is intended that the plan sponsor, the arbitrator, and the courts follow the substance rather than the form of such transactions in determining, assessing, and collecting withdrawal liability.
>
> * * *
>
> Furthermore, we intend that the term "employer" be construed in a manner consistent with the bill and its purposes. We intend that employers not be able to evade or avoid withdrawal liability through changes in identity, form, or control, or through transactions which are less than bona fide and arm's length. Hence, for example, a building and construction industry employer—or for that matter any employer contributing to a plan—will not be able to evade

> withdrawal liability by going out of business and resuming business under a different identity.

126 Cong. Rec. 23038 (1980). This statement suggests that section 1392(c) was directed at essentially fraudulent maneuvers lacking in economic substance.

The May 5 offer was neither fraudulent nor without economic substance. It was made during arms' length bargaining for a new collective bargaining agreement. From the union's standpoint, the May 5 offer undoubtedly constituted an improvement over the previous offer to terminate contributions to the Trust Fund immediately.

Furthermore, the Employers were not attempting to "evade" or "avoid" withdrawal liability. At most, they were trying to minimize withdrawal liability by planning their withdrawal to occur at a time when they believed they would benefit from an increase in the market value of the Trust Fund's assets. The Court concludes that Congress did not intend section 1392(c) to apply to employer proposals made during negotiations toward a collective bargaining agreement which are motivated, at least in part, by a desire to minimize withdawal liability.[4]

B. *Section 302(c)(5).*

The Trust Fund argues in the alternative that section 302(c)(5) of the Labor-Management Relations Act, 29 U.S.C. § 186(c)(5), dictates that withdrawal occurred on May 23, 1983. Specifically, the Trust Fund argues that that statute prohibited it from accepting employer contributions after that date.

The Ninth Circuit described the purpose of section 302 in *NLRB v. United Brotherhood of Carpenters & Joiners,* 531 F.2d 424, 427 (9th Cir. 1976), as follows:

> Section 302 was intended to regulate payments by employers to employee representatives, and was aimed at forestalling practices Congress considered injurious to the collective bargaining process such as bribery of employee representatives by employers, extortion by employee representatives, and the potential abuse of power by union officials armed with sole control of welfare funds. (citing *Arroyo v. United States,* 359 U.S. 419 (1959)).

Because of these concerns, section 302 generally prohibits payments by employers to employee representatives. However, section 302(c)(5) provides an exception for contributions to a trust fund established "for the sole and exclusive benefit of the employees of such employer, and their families and dependents . . . *Provided* That, . . . (B) the detailed written basis on which said payments are to be made is specified in a written agreement with the employer . . . ." 29 U.S.C. § 186(c)(5)(B).

The Trust Fund contends that, as of the date of impasse, there was no longer a written agreement setting forth the basis of the payments to the Trust Fund. The Trust Fund relies on *Moglia v. Geohegan,* 403 F.2d 110 (2d Cir. 1968), *cert. denied,* 394 U.S. 919 (1969). There, the Second Circuit held that a trust fund could not accept contributions for and pay benefits to an employee when the employer never signed a written agreement specifying the basis of the payments into the Trust Fund.

Moglia is distinguishable from the present case. Here, the basis of the contributions was detailed in the expired

CBA. The written agreement requirement of section 302(c)(5) is satisfied by an expired CBA when an employer continues to make contributions pursuant to the CBA while negotiations for a new CBA are continuing, since the employer is required to do so under the duty to bargain in good faith. *See, e.g., Producers Dairy Delivery Co. v. Western Conference of Teamsters Pension Trust Fund,* 654 F.2d 625, 627 (9th Cir. 1981), *Peerless Roofing Co. v. NLRB,* 641 F.2d 734, 736 (9th Cir. 1981) (distinguishing *Moglia*). In *Carter v. CMTA-Molders & Allied Health and Welfare Trust,* 736 F.2d 1310, 1312-13 (9th Cir. 1984), the Ninth Circuit held the written agreement requirement was satisfied where an employer who, upon purchasing his predecessor's business, allowed the CBA to expire but continued to make payments in accordance with the expired CBA for five and one-half years.

The fact that an impasse was reached prior to the Trust Fund's refusal to accept the Employers' payments does not preclude the CBA from satisfying the written agreement requirement. As discussed above, the Employers obligated themselves to adhere to the terms of the May 5 offer when they elected to continue contributing upon impasse. That offer provided that the Employers "shall continue [the] present pension plan through August 31, 1983, which shall be subject to an eligibility requirement of twelve months' continuous service". Although this offer added a new elegibility requirement, it nevertheless provided that payments were to be made in accordance with the provisions of the expired CBA. The detailed basis for the payments was thus set out in the expired CBA. Accordingly, section 302(c)(5) did not

bar the Employers from continuing to make the payments nor did it bar the Trust Fund from accepting them.

C. *Attorney's Fees.*

The Employers included in their motion a request for attorney's fees, pursuant to 29 U.S.C. § 1451(e), which provides:

> In any action under this section, the court may award all or a portion of the costs and expenses incurred in connection with such action, including reasonable attorney's fees, to the prevailing party.

Plaintiffs may seek an award of attorney's fees by separate motion in which the issue is fully briefed and a detailed fee application is provided.

ORDER

(1) The Employers' motion for summary judgment is GRANTED, and the Trust Fund's cross-motion for summary judgment is DENIED.

(2) Judgment shall be entered for the plaintiffs, Cuyamaca Meats, Inc., C & M Meat Packing Corp., and National Meat Packers, Inc.:

(a) Declaring that the plaintiffs withdrew from the defendant Trust Fund on September 1, 1983;

(b) Dismissing the counter-claim filed by the Trust Fund;

(c) Awarding plaintiffs their costs of suit, pursuant to Local Rule 265, plus any reasonable attorney's fees to which plaintiffs may be found entitled.

DATED: June 26, 1986

/s/ Rudi M. Brewster
UNITED STATES DISTRICT
JUDGE

FOOTNOTES

1 The parties are agreed that this case does not involve a "partial withdrawal."

2 In fact, as noted above, the plan year would not end until June 30, 1983.

3 The May 5 proposal added an eligibility requirement—that employees must have provided twelve months of continuous service—that was not present in the 1979 CBA.

4 While the Trust Fund argues that the Employers attempted to evade withdrawal liability, the Employers, not without reason, charge that the Trust Fund is seeking a windfall payment, given the significant increase in the value of the Trust Fund's assets during its plan year ending June 30, 1983. It is clear that both sides have been motivated by a desire to maximize their economic position. The Court does not consider such possible motivation, if true, by either side to be determinative. Instead, as explained above, the holding is based on an effort to harmonize the NLRA case law with section 1392(a) of the MPPAA.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF CALIFORNIA

CUYAMACA MEATS, INC., a California corporation; C & M MEAT PACKING CORP., a California corporation; NATIONAL MEAT PACKERS, INC., a California corporation, Plaintiffs, vs. SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association, Defendant.	CASE NO. 84-1169-B (CM) JUDGMENT (Filed June 26, 1986)
SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association, Counter-claimant, vs. CUYAMACA MEATS, INC., a California corporation; C & M MEAT PACKING CORP., a California corporation; NATIONAL MEAT PACKERS, INC., a California corporation, Counter-defendants.	

This case came on for cross-motions for summary judgment on April 7, 1986. For the reasons set forth in the Opinion and Order Granting Plaintiffs' Motion for Summary Judgment,

IT IS HEREBY ORDERED, ADJUDGED, AND DECREED THAT:

1. The plaintiffs, CUYAMACA MEATS, INC., C & M MEAT PACKING CORP., and NATIONAL MEAT PACKERS, INC., withdrew from the defendant, SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, on September 1, 1983;

2. The defendants' counter-claim is dismissed;

3. The plaintiffs shall be awarded their costs of suit, pursuant to Local Rule 265, plus any reasonable attorney's fees to which plaintiffs may be found entitled.

DATED: June 26, 1986

/s/ Rudi M. Brewster
UNITED STATES
DISTRICT JUDGE

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APPENDIX C

NOT FOR PUBLICATION
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

CUYAMACA MEATS, INC., a California corporation, C & M MEAT PACKING CORP, a California corporation and NATIONAL MEAT PACKERS, INC., a California corporation,	)	No. 86-6182
Plaintiffs-Appellees,	)	D.C. No. 84-1169-B(CM)
vs.	)	ORDER
SAN DIEGO AND IMPERIAL COUNTIES BUTCHERS' AND FOOD EMPLOYERS' PENSION TRUST FUND, an unincorporated association,	)	(Filed Dec. 1, 1987)
Defendant-Appellant.	)	

Appeal from the United States District Court
for the Southern District of California

Rudi M. Brewster, District Judge, Presiding

Argued and submitted June 3, 1987
Pasadena, California

Filed September 3, 1987

Before: ALARCON and O'SCANNLAIN, Circuit Judges, and REED,* District Judge

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* Honorable Edward C. Reed, Jr., United States District Judge District of Nevada, sitting by designation.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied and the suggestion for rehearing en banc is rejected.

APPENDIX D

STATUTES INVOLVED

A. Employee Retirement Income Security Act of 1974, As Amended

Section 4201(a), 29 U.S.C. § 1381(a) provides:

> If an employer withdraws from a multiemployer plan in a complete withdrawal or a partial withdrawal, then the employer is liable to the plan in the amount determined under this part to be the withdrawal liability.

Section 4203(a)(1), 29 U.S.C. § 1383(a)(1) provides:

> For purposes of this part, a complete withdrawal from a multiemployer plan occurs when an employer—
>
> (1) permanently ceases to have an obligation to contribute under the plan.

Section 4212(a), 29 U.S.C. § 1392(a) provides:

> For purposes of this part, the term—"obligation to contribute" means an obligation to contribute arising —(1) under one or more collective bargaining (or related) agreements, or (2) as a result of a duty under applicable labor-management relations law.

B. Labor Management Relations Act of 1947, As Amended

Section 302, 29 U.S.C. § 186, provides in pertinent part:

> (a) It shall be unlawful for any employer or association of employers or any person who acts as a labor relations expert, adviser, or consultant to an employer or who acts in the interest of an employer to pay, lend, or deliver, or agree to pay, lend, or deliver, any money or other thing of value—
>
> (1) to any representative of any of his employees who are employed in an industry affecting commerce; or

(2) to any labor organization, or any officer or employee thereof, which represents, seeks to represent, or would admit to membership, any of the employees of such employer who are employed in an industry affecting commerce; or

(3) to any employee or group or committee of employees of such employer employed in an industry affecting commerce in excess of their normal compensation for the purpose of causing such employee or group or committee directly or indirectly to influence any other employees in the exercise of the right to organize and bargain collectively through representatives of their own choosing; or

(4) to any officer or employee of a labor organization engaged in an industry affecting commerce with intent to influence him in respect to any of his actions, decisions, or duties as a representative of employees or as such officer, or employee of such labor organization.

(b)(1) It shall be unlawful for any person to request, demand, receive, or accept, or agree to receive or accept, any payment, loan, or delivery of any money or other thing of value prohibited by subsection (a) of this section.

(2) It shall be unlawful for any labor organization, or for any person acting as an officer, agent, representative, or employee of such labor organization, to demand or accept from the operator of any motor vehicle (as defined in part II of the Interstate Commerce Act [footnote omitted]) employed in the transportation of property in commerce, or the employer of any such operator, any money or other thing of value payable to such organization or to an officer, agent, representative or employee thereof as a fee or charge for the unloading, or in connection with the unloading, of the cargo of such vehicle: *Provided,* That nothing in this paragraph shall be construed to make unlawful any payment by an employer to any

of his employees as compensation for their services as employees.

(c) The provisions of this section shall not be applicable . . . (5) with respect to money or other thing of value paid to a trust fund established by such representative, for the sole and exclusive benefit of the employees of such employer, and their families and dependents (or of such employees, families, and dependents jointly with the employees of other employers making similar payments, and their families and dependents): *Provided,* That (A) such payments are held in trust for the purpose of paying, either from principal or income or both, for the benefit of employees, their families and dependents, for medical or hospital care, pensions on retirement or death of employees, compensation for injuries or illness resulting from occupational activity or insurance to provide any of the foregoing, or unemployment benefits or life insurance disability and sickness insurance, or accident insurance; (B) the detailed basis on which such payments are to be made is specified in a written agreement with the employer, and employees and employers are equally represented in the administration of such fund, together with such neutral persons as the representatives of the employers and the representatives of employees may agree upon and in the event the employer and employee groups deadlock on the administration of such fund and there are no neutral persons empowered to break such deadlock, such agreement provides that the two groups shall agree on an impartial umpire to decide such dispute, or in event of their failure to agree within a reasonable length of time, an impartial umpire to decide such dispute shall, on petition of either group, be appointed by the district court of the United States for the district where the trust fund has its principal office, and shall also contain provisions for an annual audit of the trust fund, a statement of the results of which shall be available for inspection by interested persons at the principal office of the trust fund and at such

other places as may be designated in such written agreement; and (C) such payments as are intended to be used for the purpose of providing pensions or annuities for employees are made to a separate trust which provides that the funds held therein cannot be used for any purpose other than paying such pensions or annuities . . .

C. National Labor Relations Act, As Amended

Section 8(a)(5), 29 U.S.C. § 158(a)(5) provides, in relevant part:

(a) It shall be an unfair labor practice for an employer—

(5) to refuse to bargain collectively with the representatives of his employees, . . .